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PRELIMINARY STATEMENT

Pending before this Honorable Court is the State's Motion to Strike Issues II and III presented by Respondent in his Answer Brief. The State's reply is confined to Issues II and III which the State maintains are not properly before this court. Accordingly, should this court grant the State's pending motion to strike Issues II and III of Respondent's Answer Brief, the arguments advanced by the State in the following pages need not be entertained.

## SUMMARY OF THE ARGUMENT

In response to the certified "guidelines" question, Hope attempts to obtain a second appeal of two issues already found to be without merit by the Second District Court of Appeal. Neither claim is properly before this Court.

First, the trial court did not err in refusing to disclose the grand jury testimony of Hope's co-defendant Howard Garrett. Garrett's trial testimony supported his claim that he knew nothing about the alleged bribery and probation purportedly assured to David Hope. Respondent sought his co-defendant's grand jury on the ground that it might be "difficult to prepare an opening statement, or closing, and a theory of corss-examination of certain witnesses without knowing what it is the co-defendants allegedly said before the Grand Jury." (R. 500-501). Respondent wholly failed to establish a predicate for the disclosure of the grand jury testimony.

Furthermore, recent case law from the United States Supreme Court and Eleventh Circuit Court of Appeals does not support Respondent's position.

Respondent's final claim, concerning the impeachment of witness Jill Boyer, is nothing more than restatement of the claim already found to be without merit by the Second District Court. The prior inconsistent statement of the witness, given under oath before the grand jury, was admissible not only for impeachment but also as substantive evidence.

## ISSUE II

WHETHER THE RESPONDENT WAS DENIED  
A FAIR AND IMPARTIAL TRIAL DUE TO  
THE TRIAL COURT'S REFUSAL TO DIS-  
CLOSE THE GRAND JURY TESTIMONY OF  
CO-DEFENDANT HOWARD GARRETT

In an attempt to secure a second appeal of two of his claims already found to be without merit, Hope argues, first of all, that the trial court erred in denying his request for disclosure of the grand jury testimony of Hope's co-defendant Howard Garrett. At trial, co-defendant Garrett testified on his own behalf. Garrett did not dispute being at Richard Hope's residence at the same time as David Hope. Garrett testified that he had been a friend of the senior Hope for several years. At trial, Garrett denied hearing any conversation between Richard Hope and David Hope concerning David having been placed on probation and no conversation ensued at the senior Hope's residence as to anything illegal being done to get David placed on probation. As found by the Second District, there was no direct evidence of any money being paid to Garrett or by Garrett to anyone in connection with David Hope's case and there was no evidence of any intervention by Garrett with co-defendant Merkle or any other officer of the court, the prosecutor, or Hope's attorney. Hope's attorney, Tom Hanlon, testified that he never talked to Garrett about the case and to the best of his knowledge Garrett had no involvement in the case. Garrett v. State, 508 So.2d 427, 429 (Fla. 2d DCA 1987).

In support of his request that the trial court disclose the secret grand jury testimony of co-defendant Howard Garrett, Hope's counsel suggested "It's very difficult . . . to prepare an opening statement, or closing, and the theory of cross-examination of certain witnesses without knowing what it is the co-defendant allegedly said before the grand jury." (R. 500). There is no doubt that Hope was engaged in a fishing expedition below and Hope's suggestion that it would be "difficult" for him to prepare his argument and cross-examination does not establish a predicate for an in-camera inspection of the grand jury testimony.

Notwithstanding the Second District Court's rejection of his claim, Hope argues that this court should revisit this issue in light of Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987). In Miller, the defendant, specifically pointing to conflicting testimony given on two separate occasions under oath by key eyewitnesses to a murder, argued that the court must at least conduct an in-camera review of the grand jury testimony. Relying on Pennsylvania v. Ritchie, \_\_\_ U.S. \_\_\_ 107 S.Ct. at 1004, 94 L.Ed.2d at 60, the Eleventh Circuit found that the sworn testimony, which contained different versions of the facts, recantations of testimony and other "questionable circumstances" presented a compelling need for an in-camera inspection.

In Pennsylvania v. Ritchie, \_\_\_ U.S. \_\_\_, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) the defendant was charged with sexual offenses against his minor daughter and he sought certain confidential records concerning his daughter that had been compiled by the State's Youth Service Agency relating to the charged offenses. The trial court

denied Ritchie's request and, at trial, the main witness against Ritchie was his minor daughter. Refusing to authorize full disclosure of the confidential material, the Supreme Court ruled that Ritchie was nevertheless entitled to an in-camera review by the trial court of the Youth Services' file to determine whether it contained information that probably would have changed the outcome of Ritchie's trial. Ritchie, of course, must first establish a basis for his claim that it contains material evidence. Ritchie, 94 L.Ed.2d at 58, fn. 15, citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 73 L.Ed.2d 1193, 102 S.Ct. 3440 (1982) ("He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense.")

Here, the testimony which Hope sought was not that of a victim or key eyewitness against him but rather that a co-defendant claiming, successfully, that he had no knowledge of nor participation in the charged offense. As the original opinion in Miller recognized in Miller v. Wainwright, 798 F.2d 426 (11th Cir. 1986), to obtain grand jury testimony, a defendant must show a particularized need, sufficient to justify the revelation of generally secret grand jury proceedings. Id. at 429, citing Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966); United States v. Proctor and Gamble, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958).

Hope claims an entitlement to the grand jury testimony of co-defendant Garrett because, not surprisingly, Garrett's exculpatory testimony was inconsistent with that of adverse witness David Hope.

[i.e. David Hope said that he went to Respondent's home where Garrett was introduced to him as "the gentleman who was responsible for getting the probation." (R. 2065). According to Garrett, he never heard any conversation between Respondent and David Hope concerning David Hope's probation. (R. 2909)]. Surely the fact that a co-defendant's exculpatory trial testimony differs, as expected, from that of the state's adverse witness does not establish a predicate for the wholesale disclosure of the co-defendant's grand jury testimony. Undoubtedly, the prosecutor would have welcomed the opportunity to present evidence that the co-defendant and the state's chief witness testified consistently and implicated the Respondent in the criminal enterprise. That did not happen below and neither the Eleventh Circuit's recent decision in Miller nor the Supreme Court's opinion in Ritchie sanctions the "fishing expedition" engaged in by Respondent which served only to obfuscate the legitimate issues at trial and fell far short of establishing a particularized need and predicate for disclosure.

ISSUE III

WHETHER RESPONDENT WAS DENIED A  
FAIR AND IMPARTIAL TRIAL AS A  
RESULT OF THE INTRODUCTION OF A  
WITNESS' PRIOR GRAND JURY TEST-  
IMONY

Without any plausible explanation as to why he is arguably eligible for a second appeal of this issue, Respondent reiterates a claim which was previously advanced and rejected by the Second District Court. Specifically, Hope claims that the trial court erred in permitting the State to impeach witness Jill Babett Boyer with her prior inconsistent grand jury testimony.

Jill Babett Boyer's testimony at trial was 180° contrary to her prior grand jury testimony. During Boyer's testimony at trial, the following statements were made.

[PROSECUTOR] Q. Well, did Mr. Hope pick up anything from the residence?

\* \* \*

[JILL BOYER]: A. I did not see David pick up anything.

(R. 2133)

[ROSECUTOR]: Q. "Well, you do not know if there was any substance in that garage like that [marijuana] that day?

[BOYER]: A. "No, sir, I did not know myself, no."

(R. 2135)

During Jill Babett Boyer's testimony before the grand jury, the following statement were made:

Q. "Well, your husband had the marijuana that David was caught with, didn't he?

A. It was in the garage.

Q. It belonged to your husband, didn't it? You knew it was there, didn't you?

A. "I knew it was there."

(R. 2157)

\* \* \*

Q. And did you inquire of Richard or David what he was talking about or whether it was pot or anything?

A. I asked him what he was talking about, and he said it was a hundred pounds of pot in the garage. I gave to him."

(R. 2161)

Boyer, the live-in girlfriend of Hope's son, "explained" her prior grand jury testimony by saying "Well, I read here the way it's typed, and it looks as if I gave it to him, and I never made that statement. . ." (R. 2161).

Hope argues that under Jackson v. State, 451 So.2d 458 (Fla. 1984), Boyer's prior grand jury testimony was inadmissible. Jackson stands for the proposition that a "mere lapse of memory is insufficient to render a witness adverse." Id at 462. Here, Boyer's testimony at trial was completely contrary to her statements to the grand jury. Moore v. State, 452 So.2d 559 (Fla. 1984) holds that prior inconsistent statements before the grand jury can be introduced as substantive evidence, even though the declarants recanted their grand jury statements at trial. [However such testimony, standing alone, is insufficient to sustain a criminal conviction, State v.

Moore, 485 So.2d 1279 (Fla. 1986).] In the instant case, the trial court did not err in allowing the state to introduce the prior inconsistent statement given by Boyer to the grand jury, §90.801(2) (a), Florida Statutes; and the Second District Court did not err in finding this claim without merit.

CONCLUSION

Based on the foregoing facts, arguments and authorities, Issues II and III are not properly before this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by U.S. Mail to ANDREW COTZIN, ESQUIRE, JOEL HIRSCHHORN, P.A., 2766 Douglas Road, Miami, Florida 33133 this 21<sup>st</sup> day of October, 1987.

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